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No. 83-1779

In the Supreme Court of the United States

OCTOBER TERM, 1984

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's policy of denying severance payments to employees over 55 because they are eligible for early retirement was excepted from the prohibitions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, prior to that Act's 1978 Amendment.

2. Whether the limitations period for an action challenging a denial of severance payments begins to run when employees become eligible for and are denied such payments, or when, prior to becoming eligible for such payments, they are told that payments will be denied.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 725 F.2d 211. The memorandum, opinion, supplemental memorandum, and orders of the district court (Pet. App. 26a-70a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1983 (Pet. App. 71a). A petition for rehearing was denied on January 31, 1984 (Pet. App. 73a). The petition for a writ of certiorari was filed on April 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner maintains a Layoff Income and Benefits (LIB) plan that provides payments to employees who are laid off because of a plant closing or for certain other reasons.

Petitioner allows only those employees who are not eligible for "early retirement" under its pension plan to obtain LIB payments. Petitioner's pension plan provides that an employee is eligible for early retirement if: (i) he is laid off as a result of a plant closing; (ii) he is 55 or older; and (iii) he has at least 10 years of service. Pet. App. 3a-5a.

On April 1, 1977, petitioner closed its Belleville, New Jersey plant. Petitioner then denied LIB payments to 65 employees who would otherwise have been entitled to them on the ground that they were 55 years old or older (and had more than 10 years' service) and were accordingly eligible for early retirement. On March 28, 1980, the Equal Employment Opportunity Commission brought this action on behalf of those 65 former employees.[1] The Commission alleged that petitioner's policy of denying, to employees 55 or older, LIB benefits that are paid to similarly situated younger workers violates Section 4(a) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a).

The United States District Court for the District of New Jersey granted petitioner's motion for summary judgment. The court held, among other things, that the action was barred by the statute of limitations (Pet. App. 32a-36a) and that the denial of LIB payments was lawful under Section 4(f)(2) of the ADEA, 29 U.S.C. 623(f)(2), which provided in pertinent part:[2]

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[1]The Commission's complaint sought relief for one named individual and others similarly situated. On February 28, 1981, the Commission filed an amended complaint seeking relief for 64 additional named individuals. The district court held that the original complaint tolled the statute of limitations only for the individual named in the complaint (Pet. App. 62a-64a), but the court of appeals reversed (*id.* at 17a). Petitioner does not challenge this ruling.

[2]Section 4(f)(2) was amended in 1978. See page 4, *infra*.

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> * * * * *
>
> to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter * * *.

Pet. App. 40a-58a.

The court of appeals reversed (Pet. App. 1a-25a). It held that the limitations period for challenging the denial of LIB payments did not begin to run until the affected employees became eligible for such payments when the plant closed (*id.* at 11a-14a). Because the complaint was filed within three years of the date of the plant closing, the court of appeals ruled that summary judgment was inappropriate.[3]

The court also held (Pet. App. 22a-25a) that the LIB program was not an "employee benefit plan" within the meaning of Section 4(f)(2). The court reasoned that Section 4(f)(2) applies only to the examples enumerated in that provision — retirement, pension, and insurance plans — and to other similar programs. The court explained that "[t]hese words are to be interpreted as indicative of the types of plans in which Congress intended to allow age distinctions; they are of the type whereby the cost of benefits increases with age" (*id.* at 23a). The court concluded that since "the LIB Plan does not reflect age-related cost factors" (*ibid.*), it is not within the Section 4(f)(2) exception. The

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[3]Under Section 7(e)(1) of the ADEA, 29 U.S.C. 626(e)(1), which incorporates Section 17 of the Fair Labor Standards Act, 29 U.S.C. 217, there is a three-year statute of limitations for willful violations and a two-year statute of limitations for other violations. The court of appeals ruled that the question whether the violation was willful is open on remand (Pet. App. 11a, 18a).

court of appeals also held (*id.* at 24a) that "the fact that the LIB Plan is tied to [petitioner's] Pension Plan does not negate the fact that it is more analogous to a 'fringe benefit' than to types of employee benefit plans covered under Section 4(f)(2)."

ARGUMENT

1. Petitioner's principal contention (Pet. 7-12) is that its LIB plan — under which employees 55 and older are denied severance pay and forced to take early retirement instead —is exempt from the ADEA by virtue of Section 4(f)(2). As petitioner recognizes (Pet. 7), the court of appeals' holding on this issue does not conflict with the decision of any other court of appeals, and the only other court of appeals that has considered a similar plan has ruled that it was not within Section 4(f)(2) for reasons similar to those stated by the court below. *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984). See also *Alford* v. *City of Lubbock*, 664 F.2d 1263, 1271-1272 (5th Cir.), cert. denied, 456 U.S. 975 (1982).

Moreover, this question does not merit review because it has little prospective practical significance. In 1978, Section 4(f)(2) was amended, and it now provides (emphasis added):

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> * * * * *
>
> to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this [A]ct, *except that no such employee benefit plan shall * * * require or permit the involuntary retirement of any individual* [between the ages of 40 and 70] * * * *because of the age of such individual* * * *.

Petitioner closed its plant in 1977, and the court of appeals declined to apply the 1978 amendment retroactively (Pet. App. 21a n.8). The 1978 amendment makes it clear, however, that a plan like petitioner's, if applied after 1978, would not be exempt under Section 4(f)(2), because petitioner's LIB plan requires the involuntary retirement of employees over 55 who are laid off; under petitioner's plan, such employees are denied the opportunity to accept severance payments and are forced to retire instead. Because future litigation involving any plan like petitioner's will focus on the interpretation of the 1978 amendment — specifically, on the question whether such a plan "require[s] * * * the involuntary retirement of any individual" — this case does not merit the Court's review.

In any event, the court of appeals' interpretation of the unamended Section 4(f)(2) is correct. Petitioner's contention, in essence, is that its LIB plan, which is essentially a severance benefits program, is exempt under Section 4(f)(2) because it can be characterized as an "employee benefit plan" (see Pet. 8-9). But virtually every fringe benefit program can be characterized as an "employee benefit plan," and Congress could not have intended the Section 4(f)(2) exception to have such a sweeping application. The central prohibition of the ADEA proscribes discrimination on the basis of age "with respect to [an employee's] compensation, terms, conditions, or privileges of employment" (29 U.S.C. 623(a)(1)). It is implausible to suppose that Congress, having enacted this broad prohibition, then proceeded to except everything that could be described as an "employee benefit" — a category that could comprise most aspects of an employee's compensation, terms, conditions, and privileges of employment. "In expounding a statute, [a court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy" (*Philbrook* v. *Glodgett*, 421 U.S. 707,

713 (1975) (citation omitted)); petitioner's interpretation of Section 4(f)(2) is unacceptable because it "would thwart the obvious purpose of the statute" (*Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (citations omitted)). The two other courts of appeals that have considered the issue have agreed with the court below on this point. See *EEOC* v. *Borden's, Inc., supra; Alford,* 664 F.2d at 1271-1272.[4]

The legislative history of Section 4(f)(2) confirms that the court of appeals was correct in ruling that the phrase "such as a retirement, pension, or insurance plan" illustrates the kind of employee benefit plans to which Congress was referring. In each of these examples, the cost of providing a benefit generally increases with the age of the employee. Consequently, if employers were required to provide such benefits on an equal basis to all employees regardless of age, they might be discouraged from hiring older workers. Senator Javits, a co-manager of the ADEA, explained, in introducing the provision that became Section 4(f)(2), that it was intended to exempt employee benefits of this kind; Section 4(f)(2) was added because "in its absence employers might actually have been discouraged from hiring older workers because of the increased cost involved in providing *certain types of benefits* to them" (S. Rep. 723, 90th Cong., 1st Sess. 13 (1967) (views of Sen. Javits) (emphasis supplied)). In a statement that this Court has cited as evidence of Congress's intent in enacting Section 4(f)(2), Senator Javits explained:

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[4]Petitioner relies (Pet. 9, 11) on *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). But as the Fifth Circuit explained in *Alford, Brennan* involved a retirement plan, one of the kinds of employee benefit plans explicitly included in Section 4(f)(2). See 664 F.2d at 1272 & n.10. Indeed, the Fifth Circuit explicitly stated that *Brennan* "did not suggest that § 4(f)(2) exempts all fringe benefits from scrutiny under the Act" (*Alford,* 664 F.2d at 1272 n.10).

> [Without Section 4(f)(2), the ADEA would] not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers * * *.

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967), quoted in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 (1977). See also 113 Cong. Rec. 31255 (1967) (remarks of Sen. Yarborough), quoted in *McMann*, 434 U.S. at 202 n.8.

Moreover, in 1969, shortly after the ADEA was enacted, the Department of Labor, which was then responsible for enforcing the ADEA, published an interpretation of Section 4(f)(2) that specifically limited the exception to employee benefit plans that have a cost factor related to age. See 29 C.F.R. 860.110(a) (1970); 34 Fed. Reg. 9709 (1969). The Commission, which has assumed responsibility for enforcing the ADEA, has continued this interpretation of Section 4(f)(2) in effect. See 29 C.F.R 860.120(a)(1).[5] "[A] contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion" is entitled to great deference (*Norwegian Nitrogen*

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[5]Petitioner is incorrect in its assertion (Pet. 11) that the Department of Labor interpreted Section 4(f)(2) differently in a letter to Congress and an opinion letter. The congressional letter (App., *infra*, 1a-4a) addressed only retirement and pension benefits, not severance payments. The opinion letter (App., *infra*, 5a-6a) made it clear that severance benefits could be withheld from an employee who had reached retirement age only because the employee had also reached the maximum age covered by the ADEA.

Products Co. v. *United States*, 288 U.S. 294, 315 (1933); see, *e.g.*, *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981)), especially when it has remained constant over a long period (see, *e.g.*, *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972)). Moreover, Congress amended the ADEA in 1974 (Pub. L. No. 93-259, § 28, 88 Stat. 74) and, as we noted, amended Section 4(f)(2) itself in 1978, without indicating any dissatisfaction with the administrative interpretation of that provision. This is strong evidence that Congress endorsed that interpretation. See *Associated Dry Goods Corp.*, 449 U.S. at 600 n.17; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) ("Congress is presumed to be aware of an administrative * * * interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

2. Petitioner submitted an affidavit stating that at some time before it closed its plant, it orally "counselled" its employees "as to ineligibility for LIB" (1 C.A. App. 47). There is no evidence in the record "as to what [the employees] were told concerning the plant closing, whether they were told that they had a choice with regard to LIB and early retirement or whether they informed that early retirement was mandatory" (Pet. App. 15a n.5). Petitioner contends that the limitations period for filing an ADEA action began to run not when the plant was closed and the employees laid off but on the earlier date when this vaguely described counselling occurred. The court of appeals was plainly correct in rejecting this contention.

An employer cannot start the running of a limitations period merely by making a vague announcement that suggests a discriminatory policy; if it could, employees would be forced to search the literature distributed to them by the employer, the collective bargaining agreement, and the oral statements of the employer's representatives to try to discover any policies that might affect them adversely at some

point far in the future. Employees would then be forced to file a complaint against their employer at a time when it might be unknown what effect, if any, the policy would have on them. As this Court has recognized on several occasions, the limitations period can begin to run only when a benefit is actually denied to an employee. See, *e.g., United Air Lines* v. *Evans*, 431 U.S. 553, 554-555 (1977); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 139 (1977). See also *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 69-70 (1982). In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), on which petitioner relies, the claimant challenged not a policy but a specific adverse action by the employer. The Court held that the limitations period began to run on the date of that decision — a denial of tenure — not on some earlier date when a vague announcement that adumbrated the action was made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1984

DOJ-1984-07

APPENDIX

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE ASSISTANT SECRETARY
FOR EMPLOYMENT STANDARDS,
Washington, D.C.

HON. HARRISON A. WILLIAMS, JR.,
Chairman, Committee on Human Resources,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your and Senator Javits' letter of August 29, 1977, in which you request the Department's response to a number of questions concerning any potential conflicts between the Employment Retirement Income Security Act of 1974 (ERISA) and the proposed amendments to the Age Discrimination in Employment Act of 1967 (ADEA).

As I indicated in my testimony before the Senate Labor Subcommittee, raising the upper age limit of the ADEA would not create any conflict with ERISA. Those responsible for administering ERISA in the Department of Labor are in complete agreement that the proposed amendments would not interfere with any of the provisions of ERISA.

The following represents the Department's answers to your specific questions:

Question 1. Would an employer be required to credit years of service for purposes of benefit accrual after normal retirement age?

Answer. It is our view that nothing in the ADEA or in the proposed amendments would require an employer to credit, for purposes of benefit accrual, those years of service which occur after an employee's normal retirement age. ERISA likewise does not require such accrual. There is a section in ERISA which limits the extent to which a plan

may provide for the accrual of benefits at a higher rate during later and presumably higher paid years of service. This provision, section 204, sets forth three alternative tests, one of which a plan must meet in order to demonstrate that benefits are being accrued properly (29 U.S.C. 1054). Two of these tests (the 33 1/3 percent test and the fractional test) explicitly permit a plan to provide that no benefits will accrue after normal retirement age (26 CFR 1.411(2)-1). The third test requires the accrual of benefits after normal retirement age. It should be noted, however, that no employer is required to select the third test provided that he satisfies one of the two other tests.

Question 2. Would an employer be required to pay the actuarial equivalent of normal retirement benefits to an employee who continues to work beyond the normal retirement age?

Answer. No. There will not have to be any adjustment in the size of the periodic payments at the time of actual retirement. This is also the case under ERISA. See the final regulations issued by the Internal Revenue Service under section 411 of the Code and section 204 of ERISA which provide that no adjustment to an accrued benefit is required on account of employment after normal retirement age [(26 C.F.R. section 1.411(c)-1(f)(2))].

Question 3. If the upper age limit is raised, some employees who choose to work beyond age 65 will be participants in plans which provide for the commencement of retirement benefits at age 65. Could such plans be amended to provide that retirement benefits would commence at the actual date of retirement without violating the ADEA or ERISA?

Answer. Generally, pension plans condition the payment of benefits on actual retirement. Thus, it would not be necessary to amend these plans since neither they nor the

ADEA nor ERISA require the payment of retirement benefits to employees who continue to work beyond normal retirement age. The requirement in ERISA (section 206(a)) is that benefits must commence at normal retirement age or on the actual date of retirement, whichever is later (29 U.S.C. 1056). Of course, if there are some plans which provide for the payment of pension benefits at a specified age, regardless of actual retirement, such plans could be amended without violating either the ADEA or ERISA.

Question 4. Would an increase in the upper age limit of the ADEA increase the funding costs for private pension plans?

Answer. An increase in the upper age limit of the ADEA would not increase the funding costs for private pension plans. As a matter of fact, financial pressure on private pension plans could be alleviated. Requiring an employer to permit a qualified employee to work until the Act's upper age limit, regardless of the pension plan's normal retirement age, would result in cost savings to plans rather than increases. As an actuarial matter, the longer an employee works, the shorter the period retirement payments will have to be made, thus lowering the funding assumptions of the plan. Savings would of course come from the added years of accumulated interest on the fund. Savings would also sten from the fact that, as indicated above, a plan need not provide for further accrual of benefits after the participant has reached the plan's normal retirement age, and thus the added years of service do not increase the ultimate retirement benefit or the cost of providing it.

It is possible that certain plans, such as those which provide for the accrual of benefits after normal retirement age, will not experience these savings. However, there will be no significant cost increase to these plans. Any increases in benefits due to such factors as salary increases after

employees have attained normal retirement age would generally be offset by factors such as the shorter life expectancy of employees upon retirement after normal retirement age, interest earned on plan assets during the period between normal retirement age and the age at which employees actually retire, and increases in pre-retirement mortality.

Question 5. Assuming that under ERISA a plan need not provide for benefit accruals for an employee who continues to work after the normal retirement age, would an employer's failure to provide for the accrual of benefits for such an employee constitute age discrimination under the ADEA?

Answer. In our opinion, a bona fide pension plan that provides that no benefits accrue to a participant who continues service with the employer after attainment of normal retirement age would not violate the ADEA. Under Section 4(f)(2) of the ADEA, it is not unlawful to observe the terms of a bona fide pension plan that is not a subterfuge to evade the purposes of the ADEA. As I noted in my testimony, the legislative history of the ADEA indicates that Section 4(f)(2) was intended to allow age to be considered in funding a plan and in determining the level of benefits to be paid. We believe that it will run counter to the intent of the Act to require a plan to provide for benefit accrual after the plan's normal retirement age.

I might also note that the proposed amendments to the upper age limit in Section 12 of the ADEA would in no manner affect the definition of the term "normal retirement age" in Section 3(24) of ERISA.

I hope these responses to your questions will be helpful to the subcommittee.

Sincerely

DONALD ELISBURG,
Assistant Secretary.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Washington, D.C. 20210

[Addressee deleted]

This is in further reply to your letters requesting an opinion on the application of the Age Discrimination in Employment Act (ADEA) to a particular severance pay plan for non-union salaried employees.

Under the terms of the plan, employees with equal years of credited service may receive differing amounts of severance pay, depending on their age at termination of service. Thus, a non-exempt employee with 15 years of service would receive 14 weeks of severance pay if he or she were 40 years old or under; 18 weeks of severance if between ages 41 and 50; 20 weeks if between ages 51 and 55; and 22 weeks if between ages 56 and 65. You state that the objective of the plan is to allow a measure of financial security to those employees whose age may make occupational relocation more difficult.

You further state that employees who remain on the payroll until age 65 (the company's normal retirement age) are not entitled to receive any severance pay. Moreover, if employees are involuntarily terminated before that age and thereby entitled to severance pay, their retirement benefits will not begin until the severance pay has run out, or until they reach age 65, whichever event occurs first. Retirement benefits are calculated as of the date of termination.

It is my opinion that in the situation described above there is no violation of the ADEA. Although Section 4(a) of the Act prohibits employment practices which discriminate against the older worker in his compensation, terms, conditions or privileges of employment, not every distinction based on age is unlawful under the Act. The purpose of the ADEA is

to protect the older worker from employment practices which discriminate against him in favor of younger workers. We agree with you that the severance pay plan you propose comes within the scope of Wage-Hour Opinion Letter (WH-389), dated June 25, 1976, which approved a job assignment plan giving certain benefits to employees over age 55. As you note, to the extent that the Interpretative Bulletin, 29 CFR 860.91(a) is inconsistent with these opinions, it will be amended accordingly.

We note that an employee who retires at age 65 is not entitled to severance pay. We also note that severance pay is terminated when an employee reaches 65 years of age (for example, an exempt employee laid off at the age of 64 years, 7 months, with 30 years of service, would receive severance pay for 5 months, rather than for 7 months, which is the normal severance pay for all exempt employees over age 56 who have 30 years of service). We do not believe that these restrictions, in and of themselves, violate the ADEA. In our view, the purpose of severance pay is to replace income from employment, which in this case an employee would not reasonably expect to be earning after age 65, because the pension plan mandates retirement at age 65 and because section 12 of the ADEA limits the protection of the Act to individuals at least 40 but not yet 65.

We trust this information will be helpful to you and we regret the delay in our response.

Sincerely,

William VanZanen
Acting Deputy Administrator
Wage and Hour Division

Xavier M. Vela
Administrator